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A Selection of Empirical Socio-Economic Research with Respect to the Functioning of Legal Rules and Institutions in Belgium and the Netherlands

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Abstract

In this paper some studies with respect to empirical socio-economic research which has been undertaken in Belgium and the Netherlands concerning the functioning of legal rules and institutions are discussed. The paper focuses on the domains of criminal law, civil procedure, liability and insurance. The paper argues that contrary to the overwhelming economic literature on liability and insurance, the empirical results in that domain are poor. More research is undertaken in the area of criminal law and apparently it is overwhelming in the area of civil procedure. The latter studies are, however, mainly undertaken by socio-legal scholars and less by economists. The general conclusion of the empirical studies discussed seems to be that while the empirical literature on the effect of changes in the decision making environment on rational actions in the legal system is rich and provocative, there is much less empirical testing of the effects of legal rules as such on allocational outcomes. The paper argues that much more effort should be devoted to the latter issue.

Keywords: Empirical research, criminal law, deterrence, cost-benefit analysis, selection of cases for trial, economics of the court system, self-regulation of attorneys, efficiency of liability rules, insurance

JEL Classification: K13, K14, K40, K42

I. Introduction¹

The aim of this paper is to provide a selection of research results concerning the functioning of legal rules and institutions in Belgium and the Netherlands. A selection will be made of papers which have been presented and published either in Dutch or French in Belgium or in the Netherlands or papers on Belgian or Dutch legal rules. One of the goals of this selection of empirical research is to analyze whether some of the claims of the economic analysis of law, that the law aims at an efficient allocation of resources, can be backed up by empirical research. This is undoubtedly in the interest of law and economics scholars in Europe generally since lawyers have often turned down economic analysis as a research method, claiming that economic methodology would not be a useful tool to analyze legal rules. Moreover, if the findings would be that empirical research is to a large extent lacking or lacking with respect to specific domains, this might

provide useful insights for the future research agenda for European law and economics scholars and especially for those scholars in Belgium and the Netherlands. Providing an overview of empirical research is, however, certainly not only useful for law and economics scholars interested in empirical justifications of their theories. One of the strengths of law and economics is undoubtedly that it has stressed the need to examine whether legal rules are able to fulfill the goals which they are said to serve. These types of effectiveness studies addressing e.g. unpredicted effects of regulation are interesting for a much wider audience as well.

Obviously the effects of legal rules have been analyzed as well in other disciplines, such as sociology of law. Some of this research in which empirical information is provided on the functioning of legal rules and institutions will be discussed as well.² This paper does, however, not provide an overview or summary of all possible studies in that respect, but merely a selection which undoubtedly will reflect some personal preferences for specific topics. Hence, the reader should not expect a Benelux version of the book of Dewees, Duff and Trebilcock in which they provide an overview of theoretical and empirical insights with respect to the domain of accident law.³ I will merely try to show how some Belgian/Dutch research has provided interesting tests of the hypotheses of the economic analysis of law. In addition some research will be discussed as well which does not address the allocational effects of legal rules themselves, but which examines the environmental circumstances under which these rules are (or are not) applied to specific cases. Many papers indeed focus on the effects of changes in the decision-making environment on the rational decisions of various actors in the legal system.

From the outset it should be made clear that since the economic analysis of law is still a relatively young discipline in the Benelux, the number of scholars available to do empirical research is limited. The first best option of having econometric analysis with regressions, showing the precise effects of e.g. changes in specific legal rules is almost totally lacking (with some exceptions as far as the domain of criminal law is concerned). There is some quantitative material in the sense that statistical data are provided on certain evolutions which are brought in relationship with e.g. changes in legal regimes. When even that statistical material is lacking I will present some qualitative information which Belgian/Dutch law and economics scholars have provided in an attempt to show that the judges or legislators in Belgium or the Netherlands followed the predictions from the economic analysis of law. This can e.g. take the form of cases in which an economic reasoning can be found. Obviously this is different from what is traditionally concerned empirical work in the social sciences. Moreover, this paper only allows to provide an overview of the studies which have been undertaken and the most important research results, but it is in most cases not possible to discuss the research methodology used.

Four domains of the legal system have been chosen for this selective overview: first the traditional domain of criminal law will be addressed (II); then a few examples from research with respect to procedural law will be presented (III).

Finally I will turn to the domain of liability and insurance (IV) and a few concluding observations will be formulated (V).

II. Criminal law

A. Introduction

An area where one would expect that there would be a sufficient amount of empirical work available is undoubtedly the domain of crime and punishment. This is an area which has received lots of attention both in economic literature and in many sociological studies. Following the pioneering work of Becker⁴ and Stigler⁵ economists have especially been interested in the questions how potential criminals could be deterred through an appropriate combination of detection and an expected punishment and what the optimal allocation of resources to crime control should be.⁶ Sociologists on the other hand have tried to examine—among others—the determinants of criminal behaviour and have thus been concerned with the question what influences the probability that someone would become either a criminal or a victim.⁷

The Netherlands and Belgium have a rich criminological tradition which resulted in various studies concerning the causes of crime. It is obviously not possible to provide an overview of those studies here; moreover this would not be relevant either since many of these studies are not concerned with the crucial question in this paper, being whether there is empirical proof that a change in the legal environment influences the behaviour of people.⁸ Therefore we shall focus on a few studies which address on the one hand Becker's hypothesis that potential criminals would react to changes in either the probability of detection or the expected sanction (the reasoning criminal hypothesis) and on the other hand studies which are concerned with Stigler's hypothesis concerning the government's allocation of resources to crime control (the reasoning government hypothesis).⁹

B. The deterrence hypothesis

Some studies in Belgium and the Netherlands have addressed the question whether the hypothesis that potential criminals can be deterred through the expectation of being detected and imposed a sanction can be supported empirically. A nice overview (though without Belgian/Dutch empirical data) on the "state of the art" in deterrence studies is provided by Moerland and Rodermond.¹⁰ The same authors have in a subsequent study provided an overview of studies which have empirically tested the hypothesis that shoplifters would be guided by a weighing of costs and benefits of the criminal behaviour in their decision to commit crime. They provide an overview of a number of North American studies who have tested this deterrence hypothesis and conclude that there is very little empirical support

for the hypothesis that the shoplifters' decision to commit crime would be influenced by his expectations concerning the legal reaction.¹¹ The importance of this study should obviously not be overstated since it merely provides a summary of other empirical research; it is therefore less clear on which methodology the scholars base their conclusions. A similar pessimistic approach concerning the deterrent effect of crime control can, strikingly, be found in a study by Van Dijk, director of the Netherlands Research Centre of the Ministry of Justice.¹² Van Dijk claims, again referring to other studies,¹³ that neither the number of policemen, nor the severity of sanctions has a significant effect on the rate for the most common crimes. These pessimistic findings therefore hold that (professional) criminals could hardly be deterred from committing crime. The question obviously arises why society should spend additional resources on the criminal justice system, if deterrence doesn't work, as Van Dijk claims. His answer is that public expenditures on crime control are justified to satisfy the public demand for law and order.¹⁴

A different picture is, however, presented in several studies of Van Tulder, a Dutch economist who spent considerable research efforts on the determinants of crime. In a 1985 book Van Tulder provides an overview of the Dutch and American empirical studies addressing the determinants of crime.¹⁵ Most of these studies which Van Tulder discusses concern criminological studies identifying the determinants of crime such as age, gender, level of education, but spent little attention to the effects of law in deterring crime. Van Tulder, however, also presents the results of a study which he conducted, which has examined the influence of the detection rate as well as the probability of conviction on crime. He found that increasing the detection rate does indeed have a negative effect on crime rate: if hypothetically a large city would raise the detection rate of crime with 1% this would lead—*ceteris paribus*—to 0,5% reduction in the registered criminality. The deterrent effect of the conviction rate seemed to be lower than the detection rate.¹⁶ A similar result was found by Van Tulder concerning the percentage of prison sanctions related to the total number of convictions: this equally leads to a reduction of the crime rate. Van Tulder, however, notes that this may be due to deterrence, but that it is equally possible that the crime rate is simply reduced in case of increased prison sanctions by the fact that the incarcerated criminals are temporarily unable to engage in the criminal activity (the so-called incapacitation effect). Although Van Tulder therefore concludes that there are significant effects of detection rates and criminal convictions on crime, he equally recognises that other criminogenic determinants (such as demographic, social and economic factors) are apparently far more important than the influence of the criminal justice system on crime rates.¹⁷

If one looks at the various studies which examined the effects of criminal justice system on crime rate in the Netherlands, there generally seem to be differences between the types of crimes. Van Dijk e.g. reports that burglars will not be deterred as a result of the risk of punishment.¹⁸ There seems to be one category where the effects of the criminal justice system (either through raising the detec-

tion rate or the expected punishment) seems, however, to be more significant. This concerns the area of traffic violations. Van Tulder indeed reports that there is a relationship between the number of convictions and the crime rate as far as drunk driving is concerned¹⁹ and even the authors who generally caused doubts upon the deterrent effect of the criminal justice system admit that increased police efforts might reduce the number of traffic violations.²⁰ Mattie and Kraay argue that with respect to speed limit violations drivers actually weigh the benefits of violation (usually in time) versus the costs (the expected punishment, but also the reduced safety).²¹ Other studies related to the area of traffic confirm this pattern: on the highway between Utrecht and Amsterdam large signs made the drivers aware of the fact that the speed limit of 100 km/h would be enforced systematically: this led to a reduction of the number of speed limit violations from 28% to about 10% and to a reduction of the number of traffic accidents with personal injury of 50%.²² Finally it is interesting to point at a criminological study by Hauber who examined the influence of increased control on the public transportation system in the Netherlands on the "crime" rate (using the transportation system without paying).²³ Hauber equally found that awareness of the public at large of the increased probability of detection had a significant influence on the reduction of violations.

There has been a strong belief in crime policy in the Netherlands that increasing the time within which the sanction is imposed after the crime would increase specific deterrence. This hypothesis has been empirically investigated by Bosker, but his investigation showed that this time issue had in fact no statistically significant influence on deterrence.²⁴ Speedy criminal procedures and imposition of sanction may, however, still be useful from a rule of law perspective.²⁵

C. Costs of crime

If we now turn to the other question, being whether the Belgian/Dutch crime control authorities allocate their resources taken into account the costs of crime, we can first point at several studies who try to establish developments in crime rates.²⁶

Several scholars argue that a good knowledge of crime rates is indispensable for an adequate crime control policy.²⁷ This approach is, however, criticized by some criminologists who argue that it is wrong to base the allocation of resources for crime control merely on statistical information concerning crime rates.²⁸

In the Netherlands Van Dijk has often pointed at the social costs of crime, basically to argue that more resources should be devoted to crime control. Van Dijk argued that the average costs of crime in the Netherlands amounted to 3,5–4,0 billion Dutch guilders in 1983.²⁹ He argued that, taking into account these costs, the available budget for crime control of about 2 billion Dutch guilders a year would be much too low.³⁰ Van Dijk and Röell have conducted a similar study several years later (in 1988) and have once more determined the total costs of crime.³¹ In this new study they argued that the Dutch society suffers a damage of

23,6 to 28,6 billion Dutch guilders as a result of crime. These studies all have the same (policy) goal: they want to convince governments to spend more efforts on crime control. The least one can say from an economic point of view is that apparently Dutch researchers try to estimate the total costs of crime as a basis for crime control policy.

D. Cost/benefit analysis of crime control policies

A next question is obviously whether research is also done with respect to the effectiveness of various options of crime control. In this respect we can once more refer to various studies of Van Tulder. Van Tulder has, first of all, examined two policy options to control crime: either raising the detection rate or the expected punishment.³² The Becker/Stigler models have indicated that both options can lead to increased deterrence, but that there are obviously cost differences: increasing the detection rate is, of course, more costly than increasing the sanction (especially if a monetary sanction is concerned). Van Tulder was interested in the question whether either raising the detection rate or the number of convictions would have a better deterrent effect.³³ Van Tulder found that raising the detection rate has a relatively better deterrent effect than raising the conviction rate. In his dissertation Van Tulder found a positive effect of more and longer prison sanctions on crime rate.³⁴ This effect was, however, mostly achieved as a result of the incapacitation effect of imprisonment. Recently Van Tulder en Van der Torre have also developed a model to determine the relationship between crime rate and the necessary prison capacity in the Netherlands.³⁵

Obviously criminologists have also addressed the practical working of the criminal justice system, e.g. by focusing on the question what determines whether a case will actually be prosecuted before the court.³⁶ These studies can, however, not be discussed within the scope of this paper.

E. Results

How do the Belgian/Dutch empirical results relate to the basic theoretical hypothesis? Obviously the basic Becker/Stigler hypothesis have been very much refined during the past thirty years, but nevertheless their papers still constitute a starting point for the economic analysis of crime. The empirical material discussed from Belgium and the Netherlands provides some support for the theory that potential criminals may alter their behaviour under the threat of an expected sanction. However, the evidence seems to go in various directions. Van Dijk presents a rather pessimistic finding, indicating that “professional” criminals could hardly be deterred through an expected sanction. More refined studies by Van Tulder, however, provide some proof of a deterrent effect of the expected sanction. Moreover, Van Tulder also proved that raising the detection rate or the number of

convictions has a better effect on deterrence than merely raising the expected sanction. This corresponds with predictions in the theoretical literature e.g. by Easterbrook who had equally indicated that potential criminals might better react to raising the detection rate³⁷ and with earlier empirical studies by Ehrlich who equally found that raising the probability of detection has a more significant deterrent effect than raising the expected sanction.³⁸ This deterrent effect (of an increased detection rate) seems even to be stronger in case of regulatory violations (such as traffic violations).

Although the empirical research presented provides therefore some support for the hypothesis that the aggregate level of crime may be influenced by raising the detection rate, a lot of other aspects on the theories of crime have not been tested yet. This is e.g. the case for the trade off between fines and prison sanctions. An interesting aspect in that respect is obviously the question whether social policy in Belgium and the Netherlands is indeed focused on an optimal use of the (cheap) fines to be able to avoid the (costly) prison sanction.³⁹ Interestingly, the Dutch policy maker apparently uses data on the costs of crime to support further expenditures on crime control. This provides some support for Stigler's hypothesis that governments will determine the "optimal level of crime" by weighing crime control costs versus the damage caused by crime. These studies, however, do not provide proof that e.g. Dutch policies on how to spend the public budget concerning crime control would be cost efficient. In sum, the empirical findings provide some confirmation, all be it modest, of the hypothesis formulated in the theoretical literature on crime.

III. Civil procedure

A. Introduction

In the discussion on liability and insurance we will indicate that the literature is strongly influenced by economists and that the interest of (Belgian or Dutch) sociologists in that topic seems of a more recent date.⁴⁰ The contrary seems to be true for the domain of civil procedure. Although there are obviously many theoretical papers on civil procedure (although most of them written outside Belgium or the Netherlands), there is a vast literature of Belgian and Dutch sociologists concerning the working of the civil procedure system. Precisely because this has received that much attention in the socio-legal literature, the domain of civil procedure cannot be neglected in a paper discussing empirical research with respect to the effectiveness of legal rules and institutions. However, precisely because there are that many papers dealing with this topic only a selection of the various studies can be presented here. For the remainder we can refer to several overviews on the state of socio-legal research in the Netherlands⁴¹ and in Belgium,⁴² which equally provide summaries of empirical studies.

B. Litigation rates and selection of cases for trial

Many studies in the Low Countries have been devoted to the question what kind of issues may generally explain litigation rates. These kind of studies are concerned with the more general question whether increased litigation is due to e.g. socio-economic determinants or to the e.g. changes of the civil procedure. Other studies are devoted to the well-known question what influences in one particular case the decision of parties to bring a lawsuit or to settle.

1. Selection of cases for trial. Starting with this last topic, the selection of cases for trial, also in the Benelux scholars have been interested to test the Priest/Klein hypothesis on the selection of cases.⁴³ Their claim is, roughly summarised, that on the basis of rational estimates of the likely decision only those cases where the chance of a plaintiff victory is 50% will go to trial; otherwise parties would settle. An interesting study in that respect has been undertaken by Van Koppen, Richters and Ten Cate in 1989 for the Dutch Ministry of Justice.⁴⁴ Using psychological field studies they examine whether indeed it would only be the 50-50 cases (in other words the cases in which there is doubt) that would end up in a trial. They have used various empirical tests (experiments) and interviews with attorneys. The working hypothesis is that during negotiations with respect to a settlement it is not that much the objective chance of winning during a trial which will determine the willingness of a party to settle, but his subjective perception of that chance. This was confirmed in their empirical research: when the attorney of one of the parties is largely overestimating the chances during trial, this may inhibit the negotiations to result in a settlement.⁴⁵ This study claims that parties who expect only a minor profit during the trial are not enough willing to settle, whereas parties who expect to win during the trial tend to give in too easily during the negotiations. They therefore argue that the weaker party during the negotiations might take too many risks and will often prefer the chance of a trial. According to them it is therefore, contrary to the Priest/Klein hypothesis, not necessarily the 50-50 cases which will wind up in trial.⁴⁶ Once a settlement is reached the study concluded that the amount for which is settled will be determined by the chances of winning during trial and the possibilities to execute a judgement. This finding seems to be consistent with economic theory.⁴⁷

The question whether a creditor will bring a lawsuit or settle (usually for a lower amount) has been examined empirically as well in a Dutch doctoral thesis on debt collection procedures in 1996 by Freudenthal.⁴⁸ Freudenthal found that 85% of all civil and commercial cases (excluding family matters) before the Dutch district courts (Rechtbanken) and lower courts (Kantongerechten) consist of money debt collection. Creditors usually have the choice between extra-judicial means of debt collection and the regular judicial procedures for money claims.⁴⁹ Freudenthal found that creditors—obviously—balanced costs and benefits and then decide the means of collection they will take. Only in 50% of cases in which extra-judicial collection was unsuccessful, a creditor will bring a case to court. Usually the

proceedings are brought before the lower court (Kantongerecht), since in that case the debt collection agency can represent the creditor. Proceedings before the district court require compulsory representation by an attorney at law, which raises costs. Of all debts handed over for extra-judicial collection, 60–80% are paid, 50% of the 20–40% left are brought to court; the remainder is considered uncollectible.⁵⁰ Freudenthal found that creditors in choosing between the extra-judicial and the judicial debt collection make a well-informed choice based on the costs and benefits. Moreover, if the judicial debt collection is chosen, the creditor will choose the court where he can get a decision within a short time after entry of the claim.⁵¹ The Amsterdam judicial collection procedures would, according to Freudenthal, provide the best results in that respect.⁵²

Obviously this whole issue of judicial versus non-judicial debt collection has received a lot of attention from lawyers who have formulated several proposals to increase the quality and effectiveness of the judicial procedures.⁵³

2. Litigation rates. Several studies have tried to calculate an evolution in the number of cases.⁵⁴ Some other studies have also tried to identify what kind of determinants influence the litigation rate. Langerwerf looked at various variables which could determine the litigation rate. One of them was economic (gross production, import and export); another was social (employment rate, quantity of the working force) and a third one was the number of attorneys.⁵⁵ His finding was that the social and economic factors most strongly influence the litigation rate but that there is no correlation at all with the number of lawyers in society. The issue of the litigation rate was briefly discussed in the Netherlands as well, referring to the question how many cases go to the Dutch Supreme Court (Hoge Raad). One of the members of the Supreme Court had been arguing that there would be a too heavy workload for the Dutch Supreme Court given the increased number of requests for review. Bruinsma, however, reacted that this increase merely corresponded with a general increase in the litigation rate in the Netherlands: when the number of cases at trial courts increases it should not be surprising that also the number of cases with the Dutch Supreme Court increases, so he argued.⁵⁶

The differences between litigation rates in various countries have also been examined by Blankenburg en Verwoerd.⁵⁷ They are interested in the question why for instance in the Netherlands there would be a higher number of out of court settlements than in Germany. They argue that this is partially caused through supply determinants such as costs, the time in which a case can be handled and the available alternatives. The possibilities for extra-judicial settlements would be larger in the Netherlands than in Germany, so they argue. Based on an analysis of labour conflicts, sale of goods, leases and traffic accidents they argue that only a small proportion of the legal conflicts actually reaches the courts. One of their conclusions is that the fact that Dutch citizens would make less use of formal judicial procedures than German citizens could be attributed to the fact that the Dutch government has made available an elaborate system of legal aid and alternatives for judicial procedures. This would have a large “filtering effect” with

respect to the cases that actually go to trial.⁵⁸ They therefore hold that the investments of the Dutch government in legal aid as well as in extra-judicial conflict mechanisms have well higher paid off in the sense that there are apparently less court cases in the Netherlands than in Germany.⁵⁹ This claim, that the civil litigation rate is considerably higher in Germany than in the Netherlands has equally been made in the doctoral dissertation of Verwoerd.⁶⁰ The same conclusion was reached by Sisma with respect to the settlement of traffic accidents.⁶¹

C. Economics of the legal aid and court system

There have been some studies by Dutch economists which on the one hand examine the price elasticity of the demand for legal aid and on the other hand examine whether the production of the court system (in terms of judgements) can be increased by raising the resources available for the court system. Both issues have been addressed by Van Tulder.⁶² Van Tulder and Jansen first of all examined the effects of the Dutch legal aid system and more particularly the question whether a contribution by the client in the legal aid system would reduce the demand for services.⁶³ They examined the effects both of price increases (of the services of lawyers) and income effects (referring to the income of the client). They found that a 1% price increase in attorneys' fees gave rise to a reduction in the demand for the attorneys' services of 0,2–0,3%. A 1% increase of income of the client on the other hand led to an increased use of the attorneys' services to 0,5–0,6%. In addition the study measured the price elasticity of the increase in the personal contribution in legal aid cases and found a price elasticity of –0,2%. This means that when the personal contribution is increased with 1% the use of the legal aid system will reduce with 0,2%. On the basis of these findings the scholars also undertook some simulations assuming various policy options to amend the legal aid system.⁶⁴ Van Tulder has extended this research later in a 1990 paper⁶⁵ in which he, again, showed the relatively low price elasticity. This shows that raising the personal contribution in the legal aid system provides relatively few possibilities to reduce expenditures (by reducing demand), given the relatively low revenues from this personal contribution from the clients. Another problem which Van Tulder signals in this second paper is that the then existing legal aid system in the Netherlands provided very few incentives for the producers of legal aid to provide efficiency. This is due to the fact that the payment to the lawyers involved in the legal aid system is not dependent upon the result or upon the quality of the services. As a result Van Tulder showed important differences in the way in which attorneys dealt with cases in the legal aid system in the various regions. Hence he argued that the system led to a substantial inequality of the services provided.⁶⁶

Finally it is interesting to point at a study undertaken by Van Tulder en Spapens in which they have measured the productivity of the judicial system.⁶⁷ They examined the number of court cases compared to the available staff and available resources. One of their conclusions was that the productivity of the courts de-

creased over time. They also found that the productivity of larger courts was slightly better than of smaller courts. Hence, they conclude that not in all cases the resources available for the judicial system are used in an effective way. This research led to a critical attack from a socio-legal perspective of Griffiths⁶⁸ arguing that one cannot simply measure the productivity of a court system as if it were a bicycle factory. In his reaction to Griffiths' criticism Van Tulder argued that either the production of the court system is driven by external circumstances or can be influenced by resources. If the first would be the case, then it would also be immaterial to spend more resources on the court system, if this could anyway not have a positive impact on the output. If, on the other hand, the production of the court system can be influenced through additional resources then Van Tulder signals that the Dutch court system has a serious problem since the available resources have seriously increased after 1983, whereas the production has seriously decreased, thus arguing that the effectiveness of the court system in using the available resources has decreased as well.⁶⁹

D. Empirical studies on the practice of civil court cases

1. Evolution in the number of cases. When we discussed the issue of the litigation rate above we already indicated that several legal-sociologists have been interested in the evolution of the number of court cases (sometimes also trying to provide an explanation for this phenomenon). The Belgian sociologists Langerwerf and Van Loon examined the evolution in the court cases in Belgium in a large number of studies. Some of these provide statistical material on the evolution of cases and caseload per judge; others also analyze the involvement of the various parties and will be discussed below. A first paper tries to test the hypothesis that the caseload for courts in the 1970s would have increased spectacularly.⁷⁰ They found that the increase of cases in the 1970s depended very much upon the tribunal or court involved. E.g. for the justices of the peace the increase of cases from 1970 to 1979 was only 12%, but for the highest court (the Cour de Cassation) the increase was 264%.⁷¹ This evolution has caused serious delays before the various Belgian courts. For the courts of appeal this led to an increase in delays in handling cases of 342% in 1979, compared to the situation in 1970. Hence, their research supports the hypothesis that there has been a "litigation explosion" with the civil courts in Belgium in the 1970s, leading to serious delays in the handling of cases. The latter might according to them partially be attributed to the fact that the number of judges has only been increased with 5% from 1970 to 1979, which is not in correspondence with the increased number of cases. Hence, they also conclude that the caseload per judge has increased in the 1970 as well, although there are considerable differences between the various courts.⁷² The same scholars have undertaken a more detailed analysis of the evolution of cases before the tribunal of first instance of Antwerp between 1970 and 1980⁷³ and before some Antwerp

justices of peace between 1971 and 1984,⁷⁴ which provide interesting data as well, which can, however, not be discussed within the scope of this paper.

2. Role of the various parties. Several studies have examined the hypothesis of the American sociologist Mark Galanter that the so-called one shotters will be relatively less successful in the civil procedure than the repeat players.⁷⁵ Van Loon, Langerwerf and Wouters have tested the hypothesis that especially the repeat players will be well represented by attorneys and that the repeat players would be more successful in the civil procedure system.⁷⁶ They found that in most of the cases (45%) a repeat player is plaintiff and a one-shotter is defendant. The number of cases of one-shotters against repeat players is, however, increasing in Belgium (9% in 1970 to 15% in 1984). These average numbers, however, vary somewhat when the attention is focused on the various courts. The researchers found a confirmation of Galanter's theory on the representation of parties: repeat players use far more attorneys than one shotters: repeat players only acted without an attorney in 3% of the cases in 1971, but this had decreased till 1% in 1984. With the one shotters 15% acted without an attorney.

As far as the success rate was concerned, Galanter's hypothesis was confirmed as well: a one shotter has a much higher chance of winning against another one shotter than against a repeat player. A repeat player on the other hand has a much better chance of winning against a one shotter than against another repeat player. The scholars therefore conclude that their empirical findings with respect to the representation of parties and their success before Belgian civil courts largely confirm Galanter's hypothesis.⁷⁷ This finding was in conformity with previous research on Belgian courts⁷⁸; it has also been supported by the later studies of Langerwerf and Van Loon on the cases before the Antwerp tribunal of first instance and the Antwerp justices of the peace.⁷⁹

These results, confirming the Galanter hypothesis, have been found for the Netherlands as well. Jettinghoff examined the money debt collection procedures before the Rotterdam courts and discovered that 95% of the claims is brought by repeat players.⁸⁰ These studies hence all confirm the relative success of the repeat players. Galanter's hypothesis on the involvement of Repeat Player's was also examined- and confirmed- for the Dutch Supreme Court (Hoge Raad) by Bruinsma.⁸¹ This success story is, however, largely undone if it comes to the question whether the judgements are actually executed as well. Van Koppen and Malsch examined the question whether winning judgements are actually executed.⁸² They found that when it comes to execution the repeat players largely loose against the one shotter defendant, because they only execute the judgements which convict the one-shotters to pay in a relatively small number of cases: when it comes to winning the case before the court, in 73% of the cases plaintiffs seem to win, but little of that success is left when it comes to the execution phase; then 53% of all defendants get away without having to pay anything and only 32% of plaintiffs are able to recover the total amount of the claim. The conclusion of Van Koppen and Malsch is therefore that in the end the looser wins!

3. Appeal. The Belgian sociologists Langerwerf and Van Loon have equally examined the number of appeals against judgements in first instances. In this study they not only look at the appeal rates, but also at the time it takes to deal with the appeal (examining whether the increase in the number of appeals also increases the backload). Finally they analyze in the same study as well whether there is a substantial number of reforms.⁸³ They found that on average the number of appeals against judgements of justices of the peace in civil cases is relatively low, although there is an increase from 3,2% in 1965 to 4,8% in 1981. There is, however, a much higher appeal rate against judgements of justices of the peace in commercial cases: it increased from 7,3% in 1970 to 17,8% in 1979. The appeal rates show less differences with respect to the judgements of the tribunal of first instance: there is a mere increase from 13,6% in 1965 to 17,5% in 1981.⁸⁴ This nevertheless shows that the appeal rate against a judgement of the tribunal of first instance is substantially higher than against the judgements of justices of peace.

Second, the authors also examine the backload of cases with the courts of appeal between 1975 and 1980. They found that this backload has indeed increased spectacularly. A record was reached in the courts of appeal in Liège in 1980, where parties had to wait on average 10 years before their case could be pleaded before the courts of appeal.⁸⁵ Once more the authors also examined Galanter's hypothesis on the increased participation of repeat players versus the one shotters.⁸⁶

More interesting is obviously the final question as to the success rate of the appellants.⁸⁷ They found that, although the data are scarce and difficult to interpret, the number of reforms in appeal would only be 23% in the court of appeal of Antwerp. This corresponds with other research concerning the courts of appeal of Brussels.⁸⁸

4. Summary proceedings. In Dutch civil procedure (as in many other legal systems) there is a difference between the ordinary proceedings before civil courts and a summary proceedings which one can in principle only use for urgent matters. Many scholars have examined the increasing use of this summary judgement procedure (the so called kortgeding). Keijser and Tjoen-Tak-Sen established the relative growth of the number of summary proceedings compared to the average increase in the litigation rate.⁸⁹ They found that there was both an increase in the number of summary proceedings as well as in the number of other civil trials. Nevertheless, the author concludes that in many cases the parties choose the summary proceedings instead of the ordinary procedure, which would therefore in fact substitute the ordinary procedure. The summary procedure has also been examined in various studies of Bruinsma. Bruinsma first of all devoted a study to the use of the summary proceedings in the district of Amsterdam. He qualified this city as the "Mekka of the summary proceedings" since in 1987 20% of all the summary proceedings in the Netherlands were held in Amsterdam.⁹⁰ Based on his empirical research Bruinsma argued that one cannot generally answer the hypothesis that the summary proceedings would substitute the ordinary civil procedure. In some cases there is indeed this substitutive effect, e.g. when money debts are collected in

a summary proceedings, but in other cases the summary proceedings can more be considered as accessory to the basic civil procedure. The latter is, according to Bruinsma e.g. the case in dismissal cases in labour law. Bruinsma also argued that in the summary proceedings the role of the judge might even be more important than in the ordinary civil procedures. In a subsequent study Bruinsma looked at the practice of the summary proceedings in the district of Zwolle.⁹¹ He examined both the number of summary proceedings and the relative success rate of parties. Bruinsma found a significant higher number of summary proceedings in Amsterdam than in Zwolle and tries to identify some reasons for this difference. One of those may be that the backload of cases in Amsterdam is larger than in Zwolle, so that attorneys in Amsterdam would be more tempted to use the speedy summary proceedings. The advantage for the parties is that the summary proceedings provides a decision at relatively low costs within a relatively short time. Bruinsma, however, warns that there is a danger in this tendency because on the one hand judges tend to mention that their decision is only preliminary and that they can merely afford a superficial examination of the case. In practice, however, in 95% of all cases the decision in the summary proceedings is at the same time the final decision which, however, lacks the accuracy and full debate which characterises the ordinary procedure.⁹²

Finally we can point at a paper of Bruinsma of 1994 in which he argues strongly in favour of the summary proceedings and argues that this should not be any longer, as is the case today, an exception to the rule, but become an ordinary separate procedure for specific cases where the conflict is in principle still “hot” and where the conflict can afford a relatively superficial treatment during an oral procedure which aims at a practical solution for the future.⁹³

E. Role of lawyers

Various studies have also addressed the particular influence of attorneys-at-law on the civil procedure. Some of the studies relate to the question whether the role of lawyers increases the litigation rate; others refer specifically to the monopoly position of attorneys and some try to provide touchstones for measuring the quality of the services provided by attorneys.

1. More lawyers, more cases? Some have raised the question whether the litigation rate in society is linked to the number of lawyers. This would enforce the statement that the demand for legal services is created through the supply and that therefore more lawyers cause more cases. The economic argument is simply that more lawyers would lead to a fall in the price of lawyers, which causes the demand for the services of lawyers to increase.⁹⁴ Langerwerf and Van Loon showed that between 1970 and 1983 in Belgium the number of attorneys increased.⁹⁵ At the same time the number of cases increased as well. It is, however, only possible to raise the question whether there is a causal-link between the two events, but it is

impossible to answer it.⁹⁶ Bruinsma equally suggested that the increased litigation rate in the Netherlands is due to a doubling of the number of attorneys during the last 10 years.⁹⁷

The question has also been examined empirically by Langerwerf who examined what the cause was for increased litigation rates before the civil courts in Belgium between 1950 and 1980.⁹⁸ Langerwerf found a clear relationship between on the one hand social-economic variables and on the other hand the litigation rate, but also clearly found that there is only an insignificant relationship between the number of attorneys and the litigation rate. This Belgian empirical research therefore does not provide any support for the statement that supply would create demand.

2. *The monopoly position of attorneys.* Many studies have addressed the effects of the monopoly position of attorneys in the civil procedure. Most of this literature fits into the broader framework of studies which have addressed either the regulation of the retailing trade⁹⁹ or the regulation of professions in general.¹⁰⁰ The crucial question in most of these studies is whether the professional ethics and the self regulatory schemes can be considered as effective remedies to cure an informational asymmetry or should be seen as devices of rent seeking by professionals. Faure and Van den Bergh empirically examined the validity of the public interest arguments in favour of the self-regulatory regime of attorneys in Belgium. One of the arguments holds that the professions themselves have better knowledge to regulate quality. However, an analysis of the disciplinary cases handled by the Antwerp bar between 1984 and 1986 showed that the self-regulatory rules are rarely used to assure minimum quality through sanctions for malpractice, but are mostly concerned with restricting competitive behaviour by professionals. The professional body of attorneys seems indeed not so much concerned with the supervision of the quality of services, but rather with the public image of attorneys.¹⁰¹ A later study by Faure concerning the disciplinary cases handled by the "Ordre des Avocats" of the district of Turnhout between 1980 and 1985 confirmed this picture.¹⁰²

Faure and Van den Bergh argued that most of the rules providing monopoly powers to attorneys can be explained as the result of rent seeking by the professional bodies. One explanation for the influence of attorneys on the civil procedure is their relative importance in the legislative process.¹⁰³ One would obviously expect that the result of the lobbying is a transfer of wealth to the attorneys as a result of the monopoly position. Faure and Van den Bergh have provided an overview of the average income of the various professions compared to the income of self employed workers in Belgium, which provides some circumstantial evidence of a relationship between the degree of regulation and the income of the various professions.¹⁰⁴ Although the average attorney in Belgium earns indeed more than the average self-employed worker, the total amount of the rents of attorneys is rather disappointing. The explanation seems to be that there are substantial intra-professional transfers from the younger professionals to the older ones.

Indeed: only the younger professionals have to perform the pro bono cases and have difficulties establishing their own clientele through a prohibition of advertising. Langerwerf and Van Loon found that the average monthly income of the young attorneys in the training period was about 5,000 Belgian francs in 1984.¹⁰⁵ If one notices that in the same period the average income of all attorneys was approximately 700,000 Belgian francs one understands that the most significant effect of self-regulation is an intra professional transfer to a limited group of practitioners.¹⁰⁶

The monopoly position of various legal professions (bailiffs, notary publics and attorneys) is also addressed for the Netherlands in a study by Bruinsma who equally argues that the rentseeking leads to too high prices to be paid for legal services. Bruinsma backs up this statement with a reference to the revenues of the various legal professions in 1994.¹⁰⁷ An interest-group analysis by Hellingman provides evidence for rent-seeking behaviour by attorneys in the Netherlands,¹⁰⁸ just as this was described above for Belgium. Bruinsma and Huls also revealed some remarkable concerted practices between the mega lawfirms to restrict competition.¹⁰⁹

3. *Quality of services performed.* Some studies also address the question of the quality of services performed by attorneys during the civil procedure by comparing the success rate of clients represented by attorneys with clients who are not represented by attorneys. In one of the many studies of Langerwerf and Van Loon also the success rate of attorneys is addressed. They found that clients who act as plaintiff in money-debt collecting cases before the justices of the peace in Antwerp have a better success score if they are represented by an attorney than if they are not.¹¹⁰ However, the number of cases without representation by an attorney was small, but for all the examined years (1971–1984) plaintiffs did better with than without an attorney. Attorneys, however, do not necessarily better if their success rate is compared with the rates of other professionals who can plead as well. This is e.g. the case in Belgium before the labour courts, where representatives of the trade unions are allowed to plead. Empirical research by Keijers and Peeters showed that the representatives of the trade unions were relatively more successful than the average attorney.¹¹¹

The quality of the services provided by lawyers has also been examined in various studies which address the possibility of attorneys to predict the outcome of their cases. A well-known Dutch study in this respect is the dissertation by Malsch on lawyers' predictions of judicial decisions.¹¹² This study examines the possibilities for lawyers to predict the outcome of the criminal cases they will plead. She concludes, interestingly enough, that lawyers do not do any better than laymen as far as the simple question concerning success or not is concerned. When it comes to more refined questions (e.g. predicting the length of the present sanction) lawyers, however, do better than laymen.¹¹³ In addition Malsch found that attorneys generally overestimate their chances by 8% (which is obviously a relatively low number), whereby specialised attorneys do better in predicting outcomes than

non-specialised. Experience, measured by the number of years of practice, however, does not seem to influence the possibility to provide an adequate prediction of the outcome.¹¹⁴

The predictability of the outcome of various cases has also been addressed in an experiment concerning summary judgements that was undertaken by Bruinsma. His conclusions are in line with the findings of Malsch: lawyers do not do substantially better in predicting the outcome of summary cases than laymen.¹¹⁵

F. Results

Many studies in Belgium and in the Netherlands have dealt with the working of the legal system. Most of these studies, however, do not provide an explicit empirical testing of the effects of legal rules on allocational outcomes. They are more concerned with the effects of changes in the decision-making environment on rational actions in the legal system. As such, these findings are interesting as well, even though they do not always explicitly test hypotheses from the law and economics literature. In some cases, the empirical findings discussed are not presented as a test of specific theoretical literature; in other cases, they provide some indication for the significance of earlier theoretical analyses. In general, the Belgian/Dutch empirical research seems to provide—again—support for the hypotheses of the socio-economic literature, although there are some nuances as well. E.g., as far as the Priest/Klein selection hypothesis is concerned, a Dutch study confirms that the decision to litigate will mostly be influenced by the subjective perception of the chance of winning. Precisely because of differences in these subjective perceptions it will not always be the 50-50% cases which will go to trial (as was proposed by Priest/Klein).

Comparisons between the Netherlands and Germany showed that the decision to litigate might also be influenced by other variables than the ones indicated in the theoretical literature on the selection bias. Several Dutch studies indicate a general higher civil litigation rate in Germany than in the Netherlands, which can hardly be explained on the basis of the theoretical literature.

One particular hypothesis from the socio-legal literature, more particularly Galanter's story that one shotters will be relatively less successful in the civil procedure than repeat players certainly received confirmation both from Belgian and Dutch empirical studies. Repeat players seem to more often hire an attorney and have generally a higher chance of winning. Interestingly enough though, these repeat players apparently less insist on the execution of a judgement, so that in the execution phase the one shotter defendant seems to be more successful. Also the relatively low reversal of decisions on appeal (about 23% in Belgium) might be seen as a confirmation of Shavell's hypothesis that the appeals process can be considered as a means of error correction.¹¹⁶

Rather interesting are the Belgian/Dutch empirical studies with respect to the role of lawyers. Remarkably, the economic argument that more lawyers would lead

to a higher demand for the services of lawyers and hence to more cases,¹¹⁷ does not seem to be supported by a Belgian empirical study. The litigation rate was according to this study influenced by a number of variables, except the number of lawyers. Many studies have also dealt with the monopoly position of attorneys in the civil procedure. The traditional theoretical argument in favour of a regulation of the quality of attorneys would be Akerlof's hypothesis concerning the informational asymmetry between the client and the attorney.¹¹⁸ Belgian studies indicate that the professional bodies do not seem to be very much concerned with the supervision of the quality of services, but rather with restrictions of competition. However, the success rate of attorneys, compared to cases where clients are not represented, seems to be positive. A Dutch study, on the other hand, indicated that lawyers do not do very well as far as the prediction of the outcome of cases is concerned. The studies seem to provide more support for the hypothesis that professional regulation aims primarily at restricting entry, limiting competition and thus at rent seeking.¹¹⁹ But, although attorneys in Belgium and the Netherlands seem to have been successful in obtaining a major role in the civil process, the amounts of the rents they obtained is rather disappointing. Belgian studies indicate that substantial intraprofessional transfers take place from young professionals to the older ones, so that the regulations probably benefit specific groups within the profession.

IV. Liability and insurance

In this part of the paper I will finally discuss some of the research which has been done in Belgium and the Netherlands and in which some attention is paid to the possible effects of liability rules and insurance schemes on the behaviour of people. Some of these studies give qualitative evidence of the fact that judges take into account economic arguments e.g. in fixing the required care in a tort case; other studies at best provide some statistical evidence on evolutions in accidental rates or on administrative costs of various systems, but most of these studies provide information which is at best speculative. Unfortunately, none of these studies provides truly empirical evidence of the working of liability rules and insurance. I will first address liability rules (A) and then turn to insurance (B).

A. Liability

1. Do liability rules deter? The whole economic analysis of tort law¹²⁰ claims that tort law will have a preventive effect. The simple reasoning is that the *ex ante* foresight of possibly being held liable *ex post* will induce the injurer today to careful behaviour. Economists therefore claim that prevention of accidents should be the main goal of tort law, whereas lawyers traditionally deny that tort law has a deterrent function or only recognise—at best as—a side effect. Unfortunately

there is very little (in fact none at all) empirical evidence of the preventive effect of tort rules in Belgium and the Netherlands.¹²¹ The consequence of this lack of empirical research is that it obviously weakens the impact of economic analysis in recent debates on the reform of tort law. Some lawyers use statistical data on e.g. the fact that the accident rate has not increased after the introduction of compulsory insurance to argue that liability rules therefore barely had a preventive effect.¹²² These arguments were rightly countered by law and economics scholars such as Van den Bergh who correctly argued that this statistical decrease after the introduction of compulsory insurance provides no information at all on the preventive effect of tort rules if other factors that could have contributed to such a decrease are not taken into account as well.¹²³ Other lawyers argue (but also without empirical support) that the preventive effect of tort rules is at least “a not undesirable side-effect” of liability.¹²⁴

There are, however, a couple of studies which have addressed certain effects of accident law, but rarely the preventive effect. Those studies are generally interested in the question whether tort law is adequately able to provide compensation for victims of accidents and in the administrative costs of the system. In law and economics terms one could, following Calabresi,¹²⁵ say that they do not address the primary accident costs, but mostly the secondary and tertiary.

In the Netherlands during the seventies some quantitative research has been done into the practical effects of traffic liability. Most of this research is concerned with traffic accidents. One study analyses the settlement of traffic liability cases from the position of the judge. It analyzes all the judgements which have been ruled with respect to traffic liability in the Netherlands in 1967 and 1968.¹²⁶ The second study concentrated on the position of the victim and was based on a random questioning of all male victims of traffic accidents in the age between 16 and 64 in the years 1967 and 1968.¹²⁷ The third study focused on the traffic accident from the perspective of an insurer and contained 196 case studies on the way in which three major insurance companies dealt with the handling of traffic accidents.¹²⁸ An excellent summary of these three studies will recently be provided in the doctoral dissertation of Van Dam.¹²⁹

The first study, more focusing on the position of the judge, found that in 79% of the cases in which there was a traffic accident procedure, the negligence of the defendant was disputed, whereas only in 25% of cases disputes concerned the magnitude of the damage. The authors use this as an argument that most court cases merely deal with discussions concerning negligence. In the second research, focusing more on the position of the victim, the authors claimed that less than full compensation was awarded to the victims and that the legal procedures to come to compensation would be too long. They also claim that the role of tort law in compensating victims of traffic accidents would be relatively low. Tort law would, compared to other (mostly social security and first party insurance) sources only contribute to 10% of the total compensation of traffic accident losses.¹³⁰ The third study focuses on the position of the liability insurer. The authors claim that in many cases the issue of negligence of the insured injurer is mostly the most

important point to deter mine before an insurer is willing to settle. In 71% of the 135 cases, negligence could be established without any problem; in only 10% of the cases, there was contributory negligence on the part of the victim.¹³¹

There has been a relatively widely debate on the potentially deterring effects of liability rules in the Netherlands, following a recent proposal to introduce a strict liability regime for traffic accidents, according to which the driver of a car would be strictly liable for damage to passengers and non-motorised third parties, unless there would be an intentional fault or conscious recklessness on the part of the victim. This proposal follows the French “loi Badinter” which introduced strict traffic liability towards non-motorised victims unless there is an inexcusable fault (“faute inexcusable”) on the side of the victim. Belgium recently introduced a similar regime as France, although the legal technique is somewhat different.

These legislative changes and proposals have of course given rise to some debate between traditional lawyers and law and economics scholars whereby, roughly speaking, law and economics scholars predict that strict liability regimes without a serious contributory negligence defence on the part of the victim will lead too low care on the side of the victim and hence, to too many accidents.¹³² Lawyers on the other hand argue that both drivers and pedestrians will be careful anyway, irrespective of the applicable tort regime. Although none of these arguments is, unfortunately, supported by serious empirical research, it is nevertheless useful to look at some of the arguments advanced in that debate. The well-known French tort scholar André Tunc has claimed that after the introduction of the French loi Badinter the number of traffic accidents has not increased, nor have the premiums for third party traffic liability.¹³³ This empirical statement is, however, severely criticised by Roger Van den Bergh. If no other factors are indicated which might have an influence on the accident rate or the level of premiums it is of course impossible to argue that the shift to a strict liability regime with an almost no fault regime as far as the victim’s behaviour is concerned would not lead to an increase in the accident risk. Van den Bergh claims that French case law which guarantees full compensation to victims even if they have neglected the most obvious rules of the traffic code or even if they would present themselves drunken on the road, does create several inefficiencies.¹³⁴ For the same reason Van den Bergh is also very critical with respect to the Belgian traffic liability system since it, as in France, provides an almost automatic compensation to the victim, irrespective of their behaviour.¹³⁵ He claims that the German system, whereby victims still have to bear a part of the compensation themselves in case of negligence, better complies with the economic model¹³⁶ but unfortunately these statements are not backed up by empirical evidence either. However, Van den Bergh rightly indicates that the relative decrease of the number of traffic victims in recent years (at which Tunc proudly points) is obviously not necessarily related to the change in a traffic liability system. A decrease of the number of fatal accidents since 1950 seems to be a general trend in industrial countries. Hence, one cannot a priori exclude the possibility that changes in the liability system have slowed down this tendency to a decrease in the number of traffic accidents.¹³⁷ Furthermore Van den Bergh refers

to the well-known North-American studies on effects of no fault liability systems to claim that those systems would have lead to an increase in the number of traffic accidents.¹³⁸ In sum, although there is some interesting literature with respect to recent changes in the traffic liability regime in Belgium, the Netherlands, France and Germany, there is little or no empirical evidence with respect to the effect of these changes on the accident rate.

2. Administrative costs. Some (Dutch) opponents of the liability system have argued that the costs of the liability system would be huge, especially compared to other compensation mechanisms. Especially the Dutch studies, referred to above, argue that liability rules are a costly way of shifting losses from the injurer to the victim.¹³⁹ This claim is especially backed up with some modest statistical evidence in relation to the exercise of a right of recourse by first party insurers. The researchers claimed that in 57% of all the examined traffic liability cases the plaintiff was a first party insurer.¹⁴⁰ Hence, they argued that many of the administrative costs related to traffic accident procedures are caused by the right of redress exercised by first party insurers. Moreover, 77% of all the recourse claims would relate to claims with a value of less than Dfl. 3.000. Hence, they claim that an abrogation of the right of redress of social and first party insurers would lead to half the number of court procedures with respect to traffic accidents today.¹⁴¹

These numbers on the relative high administrative costs related to the recourse procedures may well be correct, but provide in fact very little information on the effectiveness of the liability system. The researchers indeed totally neglect the fact that some of these recourse actions may well have a positive effect on the incentives of injurers to prevent accidents. Nevertheless, these types of figures are often important in the debate concerning the reform of traffic liability. During the discussion concerning the reform of traffic liability in the Netherlands, it was claimed that of all the money paid by third party traffic liability insurers 40% would be paid to first party insurers in recourse actions and only 60% to the victims.¹⁴²

Some more details can be given concerning these costs of recourse actions. Bloembergen claimed in 1973 that 1/3 of all the funds paid by third party traffic liability insurers for personal injury would be paid to first party insurers.¹⁴³ In 1980 he claimed that 2/3 of all the money paid by traffic liability insurers would be paid to social insurers as a result of recourse actions.¹⁴⁴ Traffic liability insurers today claim that half of the total amounts paid for personal injury are paid to first party insurers in recourse actions.¹⁴⁵ In 1993 traffic liability insurers paid about 1 billion Dutch guilders; of this amount therefore 500 million was paid to first party insurers.¹⁴⁶

We should also point at a recent study by Weterings on the transaction costs in the compensation of personal injury.¹⁴⁷ He estimated the transaction costs involved in establishing medical causation, in establishing liability and in establishing the amount of damages and estimated that the administrative costs in the three phases are about the same. These findings are, however, based on estimates as a result of

the claim settlement practice in personal injury cases rather than on hand empirical data.

3. Cost benefit analysis in establishing the due care standard. One of the claims of the early studies concerning the economics of accident law has always been that judges in fixing the level of prevention required from parties in a potential accident setting would implicitly weigh the marginal costs of accident prevention versus the marginal benefits in a further reduction of the accident costs.¹⁴⁸ “Empirical” support for this statement was always presented by referring to the famous American Learned Hand Case¹⁴⁹ in which it was claimed that the injurer should only be held liable if the burden of precaution was lower than the probability that an accident would occur multiplied by the magnitude of the loss.¹⁵⁰ Of course, Belgian and Dutch scholars have also tried to look for similar cases in their jurisdictions to show “empirically” that judges indeed behave as economic theory predicts.¹⁵¹ Faure and Van den Bergh examined Belgian liability law and found a number of cases which could be interpreted as applications of the incremental learned hand standard.¹⁵² Similar cases can also be found in the Netherlands. In one case, which is well known among law and economics scholars the Dutch Supreme Court argued that in establishing liability the judge has to take into account the probability that not taking certain preventive measures will lead to an accident, taking into account the potential magnitude of the damage and also the costs of preventive measures.¹⁵³ This reasoning seems to fit very well in the economic model. Similar examples of cost benefit weighing in liability law can also be found in German liability law.¹⁵⁴

B. Insurance

1. Expanding liability. Insurers and enterprises generally become extremely worried in Belgium and especially in the Netherlands as a result of a seemingly expanding scope of enterprise liability. This has brought about the question for insurance companies whether it would be possible to analyze the scope of liability of industrial operators and their insurers and more particularly the factors which have a bearing upon this scope of liability. A study which was commissioned by the Dutch insurance industry analysed some of these factors influencing the scope of liability.¹⁵⁵ Obviously the mere fact that claims may rise or not provides as such very little evidence of the efficiency of such an expanding enterprise liability, but it may nevertheless be useful to show what type of factors are taken into account when the scope of liability is to be determined.¹⁵⁶ The claim is made that in western Europe victims could to a large extent rely upon elaborated first party insurance systems, so that victims individually only had incentives to sue an injurer in tort for the part of the damage that was not taken care of via the first party insurance scheme. This has, however, changed in recent years. In the Netherlands changes have taken place in the Dutch social security system, which can be

considered as external factors that force victims to make an increased use of possibilities already available within the tort system. There seems to be some empirical support for the claim that the tort system will be used more heavily by victims when they need to do so because of a withdrawing government in the social security sphere.¹⁵⁷

The likelihood that a lawsuit in tort will be brought against an industrial operator may well depend upon factors outside of tort law, such as the vague notion "willingness to claim."¹⁵⁸ In that respect an interesting study has been published by Verkruijsen, a sociologist who examined the number of "avoidable fatal accidents as a result of medical treatment." He claims that about 3.000 persons die every year in the Netherlands as a result of avoidable medical malpractice.¹⁵⁹ In addition there would be 25.000 cases of personal injury. Nevertheless only about 100 claims were brought in 1992, which, according to Verkruijsen therefore only represent the "Top of the Iceberg." Although he does not argue that all of these avoidable medical malpractice cases could give rise to liability, there is undoubtedly a serious risk that this huge amount of latent claims could be brought at some stage when the public awareness of medical malpractice in the Netherlands will increase.¹⁶⁰

It is furthermore interesting to point at some of the quantitative evidence resulting from this study on the expanding scope of enterprise liability. Van Mierlo used German and Belgian data¹⁶¹ and transformed these to the Dutch demographic situation. He found that, based on the number of occupational diseases between 1990 and 1993 the total costs of occupational diseases would increase from 58 million Dutch guilders in 1990 to 259 million Dutch guilders in 2005. This prognoses was based on an extrapolation based on a minimum scenario, assuming that no structural changes take place which increase the scope of liability substantially. If such structural changes are assumed (e.g. a further withdrawing of the government from social security) the total costs of occupational diseases may, according to this study, even rise up to 518 million Dutch guilders in 2005.¹⁶² This study obviously only relies on four reference years and is further based on prognoses, which were largely used by the Dutch insurers as an argument to change the system of coverage.¹⁶³

Hard evidence concerning a real increase in the number of liability cases is, however, missing. The Dutch association of insurers itself published statistics which showed an increase in the total amount of damage paid on general liability for enterprises from 319 million Dutch guilders in 1988 up to 478 million Dutch guilders in 1993.¹⁶⁴ However, this increase seems to have been caused mainly by an increase in the average amount of damages on every claim which increased from an average 100 in 1988 to 141 in 1993. There is, however, less evidence that also the actual number of claims has indeed increased between 1988 and 1993. So far these numbers only showed that the amount of damages paid per claim increased, but not the amount of claims. The data are confirmed in a study by Haazen and Spier¹⁶⁵: between 1989 and 1994 the claim frequency decreased with 17%, but the average amount paid per claim increased with 58%!

Obviously there is lot of intuitive statistical material available of the newspaper type where scholars claim e.g. that 30.000 new victims of asbestos will be discovered in the Netherlands in the coming 10 years.¹⁶⁶ If this is multiplied with an average amount in immaterial loss of 100.000 Dutch guilders which is paid to victims of asbestos (or their heirs), one can make the claim that the asbestos crisis will cost at least $30.000 \times 100.000 = 3$ billion Dutch guilders in the coming years in the Netherlands.¹⁶⁷ These types of calculations are undoubtedly popular with insurance companies that wish to justify a premium increase, but are obviously less useful from an academic point of view. This led recently attorney-general Jaap Spier, one of the most prestigious tort lawyers in the Netherlands, to argue that the cries of insurance companies concerning an insurability crisis totally lack any empirical support.¹⁶⁸

2. Effectiveness of risk differentiation through a bonus-malus system. In the law and economics literature it has been claimed that ex post monitoring systems such as experience rating may well constitute an effective remedy against moral hazard.¹⁶⁹ Economists look with great interest at these so-called bonus-malus regimes since these systems of risk differentiation could, when applied effectively, replace the deterrent effects of tort law. However, a bonus-malus regime usually only has very general categories and hardly ever allows for a detailed risk differentiation.

There is some modest empirical evidence with respect to the effectiveness of those bonus-malus systems in controlling the accident risks in traffic. A thorough study of the various bonus-malus systems in Europe has been conducted by Lemaire.¹⁷⁰ Lemaire shows with empirical support that in those countries where there is no intervention of the regulator in the bonus-malus system and a large variety of steps can be allowed, an optimal risk differentiation can be achieved. Lemaire makes comparisons between the bonus-malus systems in France, Belgium and the Netherlands, with respect to the question which systems corresponds optimally with the requirement of risk differentiation at low costs. However, Lemaire's research does not link the differences in bonus-malus systems with the accident rates, so that no empirical evidence is available on the effectiveness of a particular bonus-malus system. There is some (modest) empirical evidence provided by the Belgian insurer ABB with respect to the effectiveness of a bonus-malus system in the prevention of accident risks. This Belgian insurer claims that for insured trucks on which a bonus-malus system is applied, the number of accidents is considerably lower than when no bonus-malus system is applied.¹⁷¹ ABB does, however, not make clear what the source for their data is. A different result was however obtained recently by a Dutch research performed for the Dutch insurer' association.¹⁷² The study made a comparison between two groups of insured: one group which was insured according to a bonus-malus system and the other one which was not insured under bonus-malus. A striking conclusion of this research was that a bonus-malus regime does not lead to less reported claims or to less damage in general. This Dutch report therefore cannot provide support for the

argument that a bonus-malus system would have a positive effect on the accident rate.

3. Towards first party insurance? One aspect of the expanding third party liability, which was discussed above, is that American law and economics scholars have predicted that an effective remedy for expanding enterprise liability would be a shift to first party insurance. Especially Priest has powerfully argued that first party insurance would better enable an effective risk monitoring by insurance companies. Thus, they could better differentiate risks and fight the adverse selection problem.¹⁷³ There was already a widespread use of first party insurance in the Netherlands,¹⁷⁴ but its use is increasing today. One could argue that there is some empirical evidence that a move towards first party insurance would be the appropriate remedy for expanding third party liability, since this is particularly what is happening in the Netherlands today. The least one could argue is that apparently Dutch insurers have listened to Priest's warnings. Indeed: in the area of environmental liability Dutch insurers have withdrawn all together from the market as far as third party liability insurance is concerned and have instead offered coverage for soil pollution on a first party basis. A same proposal has been launched in the Netherlands as far as employers' liability for occupational diseases is concerned.¹⁷⁵ Finally one could also point that the fact that within the whole discussion on the reform of traffic liability in the Netherlands, some law and economics scholars (and some lawyers)¹⁷⁶ have equally argued that if the policy makers apparently do not believe in the preventive effect of traffic liability, a first party traffic insurance might well provide compensation to victims at lower costs than the current liability system.¹⁷⁷ These recent developments in the Netherlands correspond with the argument made in the literature that first party insurance might be an appropriate response to remedy an expanding third party enterprise liability.

C. Results

The rich empirical literature on crime and civil procedure seems to be in sharp contrast with the modest empirical findings concerning liability and insurance. Apparently the hypotheses which come most directly from the law and economics literature have not been subjected to much empirical analysis. This is e.g. the case for the general assumption in the economic analysis of accident law that potential parties to an accident setting would adapt their behaviour to the liability and insurance schemes in place. There is hardly any hard empirical evidence on a deterrent effect of tort law; the best "evidence" in Belgium and the Netherlands is merely anecdotal. There are Dutch studies which have focused on the relatively high administrative costs of the liability system and its relative ineffectiveness in compensating accident victims. Some Dutch research e.g. concerning the exercise of a right of recourse suggest that the recourse would only lead to an inefficient transfer of funds with high administrative costs. However, these studies only point

at high tertiary costs (in Calabresi terms) but provide no information on the potentially beneficial effects of recourse (or liability) actions on the reduction of primary accident costs.

Although the empirical results concerning the functioning of liability rules are disappointing, there is some empirical evidence on the increasing use of the liability system. Dutch data on an increasing number of claims provide some support for the statement of George Priest that pressures on the liability system will especially become high if tort law is used as a system to cover primary needs of victims. Priest' claim that the increasing use of the liability system would lead to an increasing call for first-party insurance seems to be supported by Dutch evidence where first party insurance is indeed advanced as a remedy for a "Dutch liability crisis."

V. Concluding remarks

In this paper I attempted to provide some insight in the empirical socio-economic research which has been undertaken in Belgium and in the Netherlands with respect to the functioning of legal rules and institutions. Given the limits of this paper I focussed on the results of a few specific legal domains, criminal law, civil procedure, liability and insurance. The results of the overview with respect to these specific domains is interesting, not so much for the specific outcome, but because this overview tells us something about what we have actually been able to establish empirically as far as the effectiveness of legal rules and institutions is concerned.

Two general points can be mentioned in this respect: first, the results are somewhat disappointing as far as liability and insurance is concerned, more promising as the domain of criminal law is concerned and apparently overwhelming in the area of civil procedure. This is striking since e.g. with respect to liability and insurance a rich theoretical literature exists which is based on various assumptions, e.g. related to the preventive effect of liability rules which is, however, not backed up by empirical research, at least in Belgium or the Netherlands. This result is obviously of interest for the determination of the future research agenda and would indicate that a shift from theoretical to empirical studies seems warranted. Second, there seem to be important differences in focus between the law and economics studies on the one hand and the socio-legal studies on the other hand. Belgian and Dutch law and economics scholars seem to have paid a lot of attention to the area of liability and insurance (although very few attention to empirical research). This area is less discussed in the socio-legal literature, although there are some papers dealing with the question how the law should allocate risks in society. The domain of crime and punishment seems to have received attention both from economists as well as from sociologists. Dutch and Belgian sociologists have clearly dominated the empirical research with respect to the area of civil procedure.

Moreover, the empirical work discussed in this paper deals with different issues. Only the—modest—work on liability and insurance seems to address the allocational effects of legal rules themselves (by addressing issues such as whether compensation of injured parties will be achieved through liability based on fault or through insurance schemes without regard to fault). The overview showed that there seems to be very little in the way of reliable empirical testing of hypotheses emanating from the law and economics literature. The sections on crime and civil procedure discuss a more satisfying body of empirical research, but their focus is not on the effects of legal rules as such; instead this research is concerned with related issues such as the influence of the number of lawyers in a legal system on the number of cases litigated. This empirical work tests hypotheses of the sort advanced by economists, but not specifically the hypotheses formulated by law and economics scholars. The paradoxical result is hence that those hypotheses that come most directly from the law and economics literature have not been subjected to much empirical analysis at all, while those that only indirectly relate to law and economics have been the focus of the bulk of empirical research.

Turning to some specific results, we can point at a few interesting results which have been obtained in Belgium and the Netherlands to support economic theories of crime and punishment. Some studies provide support for the Becker hypothesis that crime could be deterred by increasing the probability of detection or the expected sanction, but the few available studies in that respect are not overwhelmingly convincing. Many of the sociological studies dealing with crime had more attention for the criminogenic determinants (what makes people decide to engage in criminal activities) instead of focussing on the effects of legal rules and institutions on criminal behaviour. Some economists have provided empirical research to back up Stigler's hypothesis on the optimal allocation of resources to crime control.

Many socio-legal studies in Belgium and the Netherlands have focused on civil procedure, trying to explain the selection of cases for trial, litigation rates, the evolution in the number of cases and the role of the various parties in the civil procedure. Very little support is provided for the Priest/Klein hypothesis that only the fifty-fifty cases would go to trial, but overwhelming support is provided both in Belgium as well as in the Netherlands for Galanter's hypothesis on the relative success of repeat players versus one shotters in the civil procedure. Moreover, various studies, e.g. with respect to money debt collection have shown how parties assess the choice between judicial versus non-judicial claims handling, based on costs and benefits of the two alternatives. Finally Belgian and Dutch studies provided support for the hypothesis of public choice scholars that attorneys will act as a pressure group trying to obtain rents e.g. by acquiring specific monopoly rights.

Most of this empirical research dealing with the civil procedure was provided by socio-legal scholars. In general, apparently most of the empirical studies discussed in this paper have been provided by sociologists rather than by lawyers or economists. With the exception of Van Tulder very few law and economics scholars have apparently engaged in empirical studies in Belgium or the Netherlands with

respect to the domains discussed in this paper. This relative success of sociologists may be due to the fact that there is a long tradition of sociology of law in Belgium and the Netherlands. Chairs in these domains have been established mostly more than 25 years ago at the various Dutch and Belgian universities. Law and economics is a much younger discipline; only in the Netherlands (part time) chairs were established in that domain in the last 5 years. This explains why Bruinsma could write in the *Nederlands Juristenblad* in an overview of sociology of law in the Netherlands in 1993 that “sociology of law is not new any longer and new fashions present itself, such as law and economics for the ‘hard boiled’ among us, but sociology of law is and remains however the most complete empirical study of the current legal system. Law and economics reduces reality to a model with quantitative data.”¹⁷⁸ This statement provides obviously an interesting challenge for law and economics scholars: let us see after 20 years, when law and economics in Belgium and the Netherlands has had a similar investment as sociology of law had until now whether law and economics can provide empirical support for the rich theoretical literature it has developed so far.

We already pointed at the striking difference between the rich theoretical literature on liability and insurance, compared to the modest empirical results. In fact, no studies are available to back up the claim in the law and economics literature that liability rules would have a preventive effect; there is only some evidence that further risk differentiation in insurance would reduce the accident risk. Nevertheless there are some, although not quantitative, studies which show that judges e.g. in establishing the due care standard follow the assumptions of the economic models. In some cases one even has the impression that data are misleadingly represented to achieve specific policy results. One can point at the repeated claim that no fault accident schemes in traffic liability would not lead to a higher accident rate or to the claim that the exercise of the right of redress by third party liability insurers would merely lead to excessive costs (thereby neglecting the potential benefits in increased prevention). Also insurers tend to use data e.g. to argue that accident risks would have increased in recent years in the Netherlands, whereas it is in fact merely the average amount of damage per claim which increased, not the number of claims itself. Some scholars have therefore correctly argued that insurers should better cooperate in providing reliable data to academics instead of merely providing a few selective data to justify policy changes such as a premium increase.

The fact that so little reliable data on the effects of liability and insurance are available is of course the major explanation for the lack of adequate empirical research in this area in Belgium and the Netherlands. Testing the hypothesis that liability rules would deter accidents is in itself difficult, given the existence of insurance coverage. Therefore academics are dependent upon insurers to provide data to test how the behaviour of parties in an accident setting may change under different insurance schemes. Still the difference between the overwhelming theoretical literature on liability and insurance and the little empirical research available remains striking. This finding most certainly backs up a call for a drastic

change in Belgium and the Netherlands from theoretical towards more empirically oriented research. Indeed, the general conclusion of the empirical studies discussed seems to be that while the empirical literature on the effect of changes in the decision making environment on rational actions in the legal system is rich and provocative, there is much less empirical testing of the effects of legal rules as such on allocational outcomes. More effort should therefore be devoted to this latter issue.

Notes

1. I am grateful to Richard Adelstein, Ton Hartlief, Roger van den Bergh, Frank van Tulder, an anonymous referee, and the participants of the Research Workshop of the Israel Science Foundation on Empirical Research and Legal Realism for useful comments on an earlier draft of this paper.
2. The socio-legal literature will more specifically be discussed in the sections on crime and civil procedure II and III.
3. Dewees, D., Duff, D. and Trebilcock, M. (1996). *Exploring the Domain of Accident Law, Taking the Facts Seriously*, Oxford: Oxford University Press.
4. See Becker, G. S. (1968). "Crime and Punishment: An Economic Approach." *Journal of Political Economy*, 169–217.
5. See Stigler, G. (1970). "The Optimum Enforcement of Laws." *Journal of Political Economy*, 526–536.
6. For a summary of the literature see Eide, E. (2000). "Economics of Criminal Behaviour." In B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics*, Cheltenham: Edward Elgar, V, 345.
7. Several attempts have also been made to harmonise the economic and sociological approaches towards crime; an excellent example is provided by Otto, H.-J. (1982). *Generalprävention Und Externe Verhaltenskontrolle. Wandel Vom Soziologischen Zum Ökonomische Paradigma in der Nordamerikanischen Kriminologie?*, Freiburg im Breisgau: Max-Planck-Institut für Ausländisches und Internationales Strafrecht.
8. For summaries of this criminological work see e.g. Van Dijk, J. J. M., Sagel-Grande, H. I. & Toornvliet, L. G. (1998). *Actuele Criminologie*, 2nd ed., Lelystad: Vermande. As far as The Netherlands is concerned and for Belgium see Kaminsky, D. (1995). *Entre Criminologie & Droit Pénal. Un Siècle de Publications en Europe et Aux Etats-Unis*, Bruxelles: De Boeck.
9. Obviously these basic hypotheses of Becker and Stigler have been further refined in subsequent research. For a bibliographical survey see Faure, M. (1992). "Criminal Law, Economics of Crime and Law Enforcement." In B. Bouckaert and G. De Geest (eds.), *Bibliography of Law and Economics*, Dordrecht: Kluwer Academic, 504–526.
10. Moerland, H. & Rodermond, J. G. (1987). "Ontwikkelingen in het afschrikkingsonderzoek." *Panopticon*, 59–75. An overview of the literature on the deterrence-control theory of crime is equally provided in Beyleveld, D. (1980). *A Bibliography on General Deterrence*, Westmead: Farnborough.
11. Moerland, H. & Rodermond, J. G. (1987). "Winkeldiefstal, Een (te) Riskante Zaak? Onderzoek Naar Een Mogelijke Samenhang Tussen Het Plegen Van Winkeldiefstal en de Verwachte Gevolgen." *Panopticon*, 335–349.
12. Van Dijk, J. J. M. (1984). "Finacieel-Economische Aspecten Van Misdad en Misdadbestrijding." *Economisch Statistische Berichten*, 1248–1252.
13. Among others D'Anjou, L. J. M. (1975). *Effectiviteit Van Sancties*, The Hague: WODC.
14. Van Dijk, J. J. M., o.c. (1984). *Economische Statistische Berichten*, 1252.

15. Van Tulder, F. (1985). *Criminaliteit, Pakkans en Politie*, Rijswijk: Sociaal en Cultureel Planbureau, KJ, 45.
16. See Van Tulder, F., *o.c.*, 140.
17. See Van Tulder, F., *o.c.*, 141.
18. Van Dijk, J. J. M., *l.c.*, 1251: he quotes a burglar, who argued that in his profession he cannot afford to worry about the risks of penalties.
19. Van Tulder, F., *o.c.*, 141.
20. Moerland, H. and Rodermond, J. G., *l.c.* (1987). 335.
21. Mattie, P. and Kraay, J. H. (1970–1971). “Snelheidsbepalingen en politietoezicht.” *Delikt en Delinkwent*. 348–366.
22. See Visser, S. (June 18–19, 1995). “Ook GVT-2 (Utrecht-Zaltbommel) Slaat Aan.” *Politiecom Special*; and see the discussion by Van Dam, M., *o.c.*
23. See Hauber, A. (1977). *Gedrag Van Mensen in Beweging. Onderzoek Naar Agressie in Het Verkeer en Fraude Bij Het Openbaar Vervoer*.
24. Bosker, O. J. (1997). *De Generaal en Speciaal Preventieve Effecten Van Sneller Straffen*, Phd thesis, Groningen.
25. See the book review by Weerman, F. M. (1999). *Delikt and Delinkwent*. 249–256.
26. See for a few recent studies for Belgium Devroe, W. and Ponsaers, P. (1998). “Evolutie 1996–1997 Van de Geregistreerde Criminaliteit: Federaal, Provinciaal en Lokaal.” *Panopticon*. 513–552; and see for The Netherlands the contributions in the special issue of the *Tijdschrift voor Criminologie*, November/December 1998, number 4.
27. For a recent pleading in that respect see Christiansen, S. (1998). “Hoge Nood Aan Een Statistische Grondslag Voor Het Strafrechtelijk Beleid.” *Panopticon*. 483–493.
28. See for instance recently Zwanenburg, M. A. (1999). “Cijfermatige Beschrijvingen Van Criminaliteit: Botsende Belangen of Keuze?” *Ars Aequi*, katern 70, 3486–3488.
29. Van Dijk, J. J. M., *l.c.* 1248–1252.
30. Obviously this reasoning does not correspond with the Stigler model of crime since high costs of crime should obviously not necessarily lead to high costs of crime control. It all depends on how this money is spent and whether one chooses to spend it on increasing the detection rate or on raising the expected sanction.
31. Van Dijk, J. J. M. & Röell, A. (1988). “Criminaliteit in Tal en Last. Een Raming Van de Schadeen Kostenposten in Verband Met Criminaliteit.” *Justitiële Verkenningen*. 7–33.
32. This issue has especially been addressed by Polinsky, A. M. and Shavell, S. (1979). “The Optimal Trade Off Between the Probability and the Magnitude of Fines.” *American Economic Review*. 880–891.
33. See Van Tulder, F. B. (1986). “Kosten en Baten Van Twee Vormen Van Criminaliteitsbestrijding.” *Economisch Statistische Berichten*. 172–179.
34. Van Tulder, F. (1994). *Van Misdaad tot Straf. Een Economische Benadering Van de Strafrechtelijke Keten*, Rijswijk: Sociaal en Cultureel Planbureau, Studienr. 21.
35. Van Tulder, F. B. & Van der Torre (1999). “Modelling Crime and the Criminal Justice System.” *International Review of Law and Economics*, forthcoming. This model is also described in: Van Tulder, F. B. & Steinmann, P. L. M. (1999). “Benodigde Groei Van de Celcapaciteit. Achtergronden en Trends.” *Justitiële Verkenningen*. 73–86.
36. This issue is also examined by Langerwerf, E. & Van Loon, F., *o.c.* (1984–1985). *Rechtskundig Weekblad*. 376–380.
37. F. Easterbrook (1983). “Criminal Procedure as a Market System.” *Journal of Legal Studies*. 292–293.
38. Ehrlich, I. (1973). “Participation in Illegitimate Activities: A Theoretical and Empirical Investigation.” *Journal of Political Economics*. 81, 521–552.
39. This idea has been widely supported by economists. For a summary of the literature see Cooter, R. and Ulen, Th. (2000). *Law and Economics*, 3rd ed., Reading: Addison-Wesley, 428–434.

40. An exception constitutes a paper by Hoekema, A. J. (1980). "Rechtssociologische Aantekeningen Bij Het Schadevergoedingsrecht." *NJB*. 977–1000; more recent work is the dissertation by Vinke, H. (1997). *Werknemerscompensatie Bij Beroepsgebonden Schade*, The Hague: Sdu.
41. See Bruinsma, F. (1983). "Hollandse (en Vlaamse) Nieuwe in de Rechtssociologie." *Nederlands Juristenblad*. 307–311 (in this paper he equally discusses evolutions in socio-legal studies in Flanders) and Bruinsma, F. (1993). "Rechtssociologie in Nederland. Kroniek Over de Jaren '82-'92." *Nederlands Juristenblad*. 590–596; see also Hoekema, A. J. (1985). "Stromingen in de Nederlandse Rechtsociologie Van de Afgelopen 20 Jaar." *Recht en Kritiek*. 27–42.
42. For Belgium (notably Flanders) see Van Houtte, J. (1988–1989). "Rechtsociologie in Vlaanderen." *Rechtskundig Weekblad*. 417–426; and see Martens, P. (1998). "La Sociologie Juridique Existe-t-elle?" *Revue de Droit Pénal et de Criminologie*. 829–844 and Corten, O. (1998). "La Sociologie au Droit Existe-t-elle?" *Revue de Droit Pénal et de Criminologie*. 845–856.
43. Priest, G. L. & Klein, B. (1984). "The Selection of Disputes for Litigation." *Journal of Legal Studies*. 1–55; and see Priest, G. L. (1985). "Re-Examining the Selection Hypothesis: Learning from Wittmann's Mistakes." *Journal of Legal Studies*. 215–243. For a summary of the more recent literature see Cooter, R. & Ulen, Th., *o.c.* 373–426.
44. See Van Koppen, P., Richters, H. & Ten Cate, J. (July 1989). *Schikken of Procederen: Psychologische Kanttekeningen Bij de Economie Van Civielrechtelijke Geschillen*, Rotterdam: Erasmus University Rotterdam.
45. See Van Koppen, P., Richters, H. & Ten Cate, J., *o.c.* 103–104.
46. See Van Koppen, P., Richters, H. & Ten Cate, J., *o.c.* 115–116; the reader should take into account that this research did not take into account the potential risks (costs) involved in going to trial.
47. See Van Koppen, P., Richters, H. & Ten Cate, J., *o.c.* 118–119.
48. Freudenthal, M. (1996). *Incassoprocedures, Opzet Van Een Nederlandse Incassoprocedure Met Empirische en Rechtsvergelijkende Aantekeningen*, Deventer: Kluwer; a summary of her most important findings was published in English in Freudenthal, M. (1997). "Monday Debt Collection: A Comparison in Search of the Basic Elements for a Netherlands Debt Collection Procedure." *Maastricht Journal of European and Comparative Law*, 59–82.
49. Extra-judicial collection would mean to use a debt collection agency.
50. Freudenthal, M., *o.c.* 64–65.
51. Apparently creditors have a possibility to choose between different courts which opens scope for competition between them.
52. Freudenthal, M., *o.c.* 67.
53. See in that respect for instance Barendrecht, J. M. (1994). "Snel en Goed Recht Doen." *Nederlands Juristenblad*. 837–843. The issue of claims settlement in personal injury cases was also discussed by Weterings, W. C. T., *o.c.* 109–111.
54. See for instance with respect to Belgium Langerwerf, E. & Van Loon, F. (1984–1985). "De Rechtbanken in de Jaren Zeventig: Een Explosie Van Zaken?" *Rechtskundig Weekblad*. 369–386; Langerwerf, E. & Van Loon, F. (1984–1985). "Het Profiel Van de Rechtbank Van de Eerste Aanleg te Antwerpen. Evolutie Tussen 1970 en 1980." *Rechtskundig Weekblad*. 2369–2382; and Langerwerf, E. & Van Loon, F. (1986–1987). "Het Profiel Van Enkele Vrederegerechten in Het Gerechtelijk Arrondissement Antwerpen—Evolutie Tussen 1971 en 1984." *Rechtskundig Weekblad*. 1585–1602.
55. Langerwerf, E. (1986). "De Sociaal-economische Ontwikkeling en de Procesvoeringsratio's Van de Burgerlijke Rechtbanken Tussen 1950 en 1980." *Economisch en Sociaal Tijdschrift*. 87–102.
56. Bruinsma, F. (1986). "Overbelasting Van de Civiele Kamer Van de HR." *Nederlands Juristenblad*. 924.
57. See Blankenburg, E. R. & Verwoerd, J. R. A. (1987). "Vermijden en Benutten Van Civielrechtelijke procedures in Nederland en Omliggende Landen." *Justitiële Verkenningen*. 20–35; and Verwoerd, J. R. A. & Blankenburg, E. R. (1986). "Beroep op de Rechter Als Laatste Remedie?"

- Enkele Vergelijkingen Tussen de Rechtsculturen in Nederland en de West-Duitse Deelstaat Nordrhein-Westfalen." *Nederlands Juristenblad*. 1045–1052.
58. Verwoerd, J. R. A. & Blankenburg, E. R., *l.c.* (1986). *Nederlands Juristenblad*. 1051–1052.
 59. It should, however, be stressed that this result is not based on econometric analysis, so that it remains unclear whether it is actually the investments in legal aid which cause the lower litigation rate, as the authors hold.
 60. Verwoerd, J. R. A. (1988). *Beroep op de Rechter Als Laatste Remedie, Enkele Vergelijkingen Tussen de Rechtsculturen in Nederlanden de Westduitse Rechtstaat Nordrhein-Westfalen; 1970-1984*, Arnhem: Gouda Quint.
 61. Sisma, C. E. (1995). *Die Gerichtliche Und Aussergerichtliche Regulierung von Verkehrsunfällen in Deutschland und Den Niederlanden*, Köln, Bundesanzeiger; see also the review of this thesis by Bruinsma, F. (1988). *RM Themis*. 110–111.
 62. We already discussed some of his work with respect to crime and punishment in § 3.
 63. Van Tulder, F. & Janssen, S. (1988). "De Prijselasticiteit Van Het Recht." *Economisch Statistische Berichten*. 19–22; this paper provides a summary of Van Tulder, F. & Janssen, S. (1988). *De Prijs Van de Weg Naar Het Recht*, Rijswijk, Sociaal en Cultureel Plan Bureau, nr. 45.
 64. Van Tulder, F. & Janssen, S. *l.c.* (1988). *Economische Statistische Berichten*. These issues have also been examined from a socio-legal perspective in the dissertation by Klijn, A. (1991). *Rechtshulp Onderzocht en Overdacht: Theoretische Reflectie en Empirisch Onderzoek Omrent Rechtshulp in Nederland 1979–1989*, Arnhem: Gouda Quint.
 65. Van Tulder, F. (1990). "Rechtshulp in Economisch Perspectief." *Ars Aequi*. 692–705.
 66. Van. Tulder, F., *l.c.* (1990). 102.
 67. Van Tulder, F. & Spapens, A. C. (1990). *Doelmatig Rechtspreken*. Rijswijk, Sociaal en Cultureel Planbureau.
 68. Griffiths, J. (1991). "De Rechtbank Als Fietsenfabriek." *Nederlands Juristenblad*. 129–130.
 69. See Van Tulder, F. (1991). "Over Fietsen en Recht." *Nederlands Juristenblad*. 444–445 (with a brief reaction by Griffiths, J.).
 70. Langerwerf, E. & Van Loon, F. "De Rechtbanken in De Jaren '70: Een Explosie Van Zaken?" 369–386.
 71. Langerwerf, E. & Van Loon, F., *o.c.* (1984–1985). *Rechtskundig Weekblad*. 371–372.
 72. Langerwerf, E. and Van Loon, F., *o.c.* (1984–1985). *Rechtskundig Weekblad*. 381–383.
 73. Langerwerf, E. & Van Loon, F. (1984–1985). "Profiel Van de Rechtbank Van Eerste Aanleg te Antwerpen. Evolutie Tussen 1970 en 1980." *Rechtskundig Weekblad*. 2369–2382.
 74. Langerwerf, E. & Van Loon, F. (1986–1987). "Het Profiel Van Enkele Vrederechten in Het Gerechtelijk Arrondissement Antwerpen—Evolutie Tussen 1971 en 1984," *Rechtskundig Weekblad*. 1585–1602.
 75. Galanter, M. (1974). "Why the Haves Come Out Ahead—Speculations on the Limits of Legal Change." *Law and Society Review*. 95–160.
 76. See Van Loon, F., Langerwerf, E. & Wouters, Y. (1990–1991). "De Partijenconfiguratie in Burgelijke Rechtzaken in Eerste Aanleg." *Rechtskundig Weekblad*. 209–218.
 77. See their conclusions in (1990–1991), *Rechtskundig Weekblad*. 217–218.
 78. Jettinghoff, A. & Langerwerf, E. (1982). "Over Rechters en Rechtbanken." In A. J. Hoekema and J. Van Houtte (eds.), *De Rechtssociologische Werkkamer*, Deventer: Kluwer, 15–40.
 79. See Langerwerf & Van Loon, *o.c.* (1984–1985). *Rechtskundig Weekblad*. 2369–2382; and Langerwerf & Van Loon, *o.c.* (1986–1987). *Rechtskundig Weekblad*. 1585–1602; see also their study on money debt collection procedures before Antwerp justices of the peace, which confirms the same pattern: Langerwerf, E., Van Loon, F. & Smaers, G. (1988–1989). "De Vrederechter Bij de Behandeling Van Incasso's. Een Onderzoek Bij Vier Vrederechten in Het Gerechtelijke Arrondissement Antwerpen." *Rechtskundig Weekblad*. 78–88.
 80. See Jettinghoff, A. & Langerwerf, E., *l.c.* 15–40; see also the discussion of this research by Bruinsma, F. (1983). "Hollandse (en Vlaamse) Nieuwe in de rechtssociologie." *Nederlands Juristenblad*. 308–309. See also Jettinghoff, A. (1991). "Daderprofielen in Het Privaatrecht." In P. J. Van

- Koppen and H. F. M. Crombag (eds.), *De Menselijke Factor: Psychologie Voor Juristen*, Arnhem: Gouda Quint.
81. See Bruinsma, F. & Welbergen, R. (1998). *De Hoge Raad Van Onderen*, Zwolle: Tjeenk Willink; and Bruinsma, F. (1988). *Cassatierechtspraak in Civiele Zaken; Een Rechtssociologisch Verslag*, Zwolle: Tjeenk Willink; see also the—highly critical—review of this research by Griffiths, J. (1989). “Het Interessante Van de Hoge Raad.” *RdW*. 80–99.
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 85. The average back load in 1981 for all courts of appeal was already 6,06 years compared to 1,77 years in 1965 Langerwerf, E. & Van Loon, F. (1986–1987). 425.
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 91. Bruinsma, F. (1992). “Het Kort Geding Van A Tot Z.” *Nederlands Juristenblad*. 1257–1262.
 92. Bruinsma, F., *l.c.* (1992). 1261–1262.
 93. Bruinsma, F. (1994). “Het Kort Geding Van Uitzondering Naar Regel.” *Nederlands Juristenblad*. 1125–1131. See for a reaction on these studies by Bruinsma: Van Manen, N. (1996). “Het Betere Kort Geding Volgens Freek Bruinsma.” *Rechtshulp*. 2–12.
 94. For a summary of the argument see Cooter, R. & Ulen, Th., *o.c.* 384–386.
 95. From 3,704 in 1970 to 7,351 in 1983.
 96. Langerwerf, E. & Van Loon, F. (1984–1985). 381–382.
 97. Bruinsma, F. (1986). “Overbelasting Van de Civiele Kamer Van de HR.” *Nederlands Juristenblad*. 924; this statement is, however, rejected by Snijders, H. J. (1986). “Naschrift.” *Nederlands Juristenblad*. 924–925.
 98. Langerwerf, E., *l.c.* (1986). 87–102.
 99. See with respect to the retailing trade for instance Van den Bergh, R. (1986). “Belgian Public Policy Towards the Retailing Trade.” In J. M. Graf von der Schulenberg and G. Skogh (eds.), *Law and Economics & the Economics of Legal Regulation*, Boston: Kluwer Academic, 185–205 who explains the Belgian rules concerning professional licensing and regulation of the retailing trade as examples of the economic theory of regulation; and see Jaffer, S. M. & Kay, J. (1986). “The Regulation of Shop Opening Hours in the United Kingdom.” In J. M. Graf von der Schulenburg and G. Skogh (eds.), *Law and Economics & the Economics of Legal Regulation*, Boston: Kluwer Academic, 169–183.
 100. See the various contributions in Faure, M. e.a. (1993). *Regulation of Professions. A Law and Economic’s Approach to the Regulation of Attorneys and Physicians in the U.S., Belgium, The Netherlands, Germany and the U.K.*, Antwerp: Maklu; and see the Dutch overview paper by De Byl, P. & Van Damme, E. (1996). “Regulering en Zelfregulering in Markten Met Kwaliteitonzekerheid,” Tilburg: Centre for Economic Research.
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114. Malsch, M., *o.c.* 83–87. Her main conclusion therefore is that specialisation in certain subject matters can increase the quality of the services provided by attorneys.
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117. Compare: Landes, W. (1971). "An Economic Analysis of the Courts." *Journal of Law and Economics*. 14, 61.
118. See Akerlof, G. (1970). "The Market for 'Lemons': Quality, Uncertainty and the Market Mechanism." *Quarterly Journal of Economics*. 488–500.
119. See Dingwall, P. & Fenn, P. (1987). "A Respectable Profession? Sociological and Economic Perspectives on the Regulation of Professional Services." *International Review of Law and Economics*.
120. For an excellent summary of this literature see Shavell, S. (1987). *Economic Analysis of Accident Law*. Cambridge, Mass.: Harvard University Press.
121. The Benelux countries constitute no exception in that respect; also the North-American evidence with respect to the preventive function of tort rules is weak. See the discussion by Dewees, D., Duff, D. & Trebilcock, M., *o.c.*
122. See Bocken, H. & Geers, I. (1996). "De Vergoeding Van Letselschade en Schade Door Overlijden Bij Verkeersongevallen. Belgisch Recht." *Tijdschrift Voor Privaatrecht*. 1199–1269. A similar argument is made by Simoens, D. (1993–1994). "Objectieve Aansprakelijkheid Inzake Wegverkeer." *Jura Falconis*. 532–546.
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124. See in that respect e.g. the recent dissertation by Lindenbergh, S. (1998). *Smartengeld*, Deventer: Kluwer.
125. See his (1970), *The Cost of Accidents: A Legal and Economic Analysis*, New Haven: Yale University Press.

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131. So De Groot, G. R. J., *o.c.* 34–37.
132. White even claimed that this might in turn also negatively affect the injurers incentives for care. See White, M. (1989). “An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law.” *Rand Journal of Economics*. 20, 308–330.
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134. Van den Bergh, R. (1994–1995). “Is Verkeersveiligheid te Duur? Kritische Rechtsvergelijkende en Rechtseconomische Bedenkingen Bij de Nieuwe Belgische Vergoedingsregel Voor Voetgangers en Fietzers.” *Rechtskundig Weekblad*. 1313–1323; see also Van den Bergh, R. (1998). “Automatische Vergoeding Van Schade Geleden Door Zwakke Verkeersdeel Nemers: Een Rechtseconomische Kritiek.” In M. Faure and T. Hartlief (eds.), *Verkeersaansprakelijkheid in België en Nederland*. Antwerp: Intersentia. 27–74, in particular 57.
135. Van den Bergh, R., *l.c.* (1994–1995). 1319.
136. Van den Bergh, R., *l.c.* (1994–1995). 1319; see also Visscher, L. T. & Van den Bergh, R. J. (1998). “Over Fietsende Juristen en Autorijdende Rechtseconomen of Een Nieuwe Fase in Het Debat Over Verkeersaansprakelijkheid.” *NJB*. 122–127.
137. So Van den Bergh, R., *l.c.* (1998). 63.
138. Some of these studies will be discussed below.
139. See in addition to the studies mentioned above also Bloembergen, A. R. (1994). “Het SER-Rapport Over Regresrechten: Een Fout Verhaal.” *Nederlands Juristenblad*. 117–123.
140. See Bloembergen, A. R. e.a., *o.c.* 17–20.
141. Bloembergen, A. R. e.a., *o.c.* 60.
142. See e.g. Van Maanen, G. E. (1998). “Wetsvoorstel Verkeersongevallen: Dwaling of Boerenbedrog?” *NJB*. 116–121.
143. See Bloembergen, A. R. (1973). “Naar Een Nieuw Verkeersongevallenrecht.” *NJB*, 961–971 and 998–1009.
144. Bloembergen, A. R. (1980). “De Invloed Van Verzekeringen.” *Nederlands Juristenblad*. 174–183.
145. See Faure, M. (1996). “Regres in Een Rechtseconomisch Perspectief.” In W. H. Van Boom, T. Hartlief and J. Spier (eds.), *Regresrechten Afschaffen, Handhaven of Uitbreiden?*, Deventer, W. E. J.: Tjeenk Willink, 55.
146. For further details see Faure, M., *l.c.* 55–58.
147. Weterings, W. C. T. (1999). *Vergoeding van Letselschade en Transactiekosten. Een Kwalitatieve en Kwantitatieve Analyse*, Deventer: Tjeenk Willink.
148. A summary of this literature has been published in Belgium/The Netherlands by Faure, M. & Van den Bergh, R. (1989). *Objectieve Aansprakelijkheid, Verplichte Verzekering en Veiligheidsregulering*. Maklu: Antwerp.
149. US vs. Carroll Towing, 159 F 2d 169 (2d Cir.1947).
150. Which was subsequently criticised in the literature, since the economic method supposed the use of an incremental learned hand standard.
151. Obviously I realise that this kind of evidence can at best only be qualified as qualitative support of the literature.
152. See Faure, M. & Van den Bergh, R. (1987–1988). “Efficiënties Van Het Foutcriterium in Het Belgisch Aansprakelijkheidsrecht.” *Rechtskundig Weekblad*. 1109–1114.

153. Dutch Supreme Court 5 November 1965, *Nederlandse Jurisprudentie*, 1966, Nr. 136, see the discussion of this case by Holzhauser, R. W. & Teijl. (1995). *Inleiding Rechtseconomie*, 2nd ed., Arnhem: Gouda Quint. 132–137, who equally provide other examples. See also Kerkmeester, H. & Holzhauser, R. (1999). *Rechtseconomische Annotaties, Elf Standaardarresten Rechtseconomisch Becommentarieerd*. Deventer: Gouda Quint.
154. See Schäfer, H.-B. & Ott, C. (1995). *Lehrbuch Der Ökonomischen Analyse des Zivilrechts*, 2nd ed., Berlin: Springer, 148–153.
155. See Faure, M. & Hartlief, T. (eds.) (1995). *Verzekering en de Groeiende Aansprakelijkheidslast, Een Juridisch, Gezondheidskundig en Economisch Onderzoek Naar de Ontwikkelingen Met Betrekking Tot de Aansprakelijkheidslast en de Consequenties Voor Verzekeraars n.a.v. de Werkgeversaansprakelijkheid Voor Bedrijfsongevallen en Beroepsziekten*, Deventer: Kluwer.
156. For an analysis of these factors see Faure, M. & Hartlief, T. (1996). “Towards an Expanding Enterprise Liability in Europe? How to Analyze the Scope of Liability of Industrial Operators and Their Insurers.” *Maastricht Journal of European and Comparative Law*. 235–270; see also Faure, M. & Hartlief, T. (1998). “Remedies for Expanding Liability.” *Oxford Journal of Legal Studies*. 18, 681–706.
157. The relationship between tort law and the social security system is also analysed from a sociological perspective by Hoekema, A. J. (1980). “Rechtssociologische Aantekeningen Bij Het Schadevergoedingsrecht.” *NJB*. 977–1000; and by Vinke, H. (1997). *Werknemerscompensatie Bij Beroepsgebonden Schade*. The Hague: Sdu. See also the proceedings volume of De Jong, P., Schwitters, R., Van Seters, P. & Wilthagen, T. (eds.) (1995). *Arbeid, Recht en Risico*. Amsterdam: Siswo, in which work related risks are analysed from a socio-legal perspective.
158. The importance of this willingness to claim was addressed by Haazen, O. A. & Spier, J. (1996). In A. T. Bolt and J. Spier (eds.), *De Uitbreidende Reikwijdte Van de Aansprakelijkheid Uit Onrechtmatige Daad*. Handelingen Nederlandse Juristen Vereniging, Zwolle: Tjeenk Willink, 42–43.
159. Pushing it a little, Verkruijsen notices that this is more than twice the amount of the casualties which result from car accidents in The Netherlands (“only 1.200 deaths”).
160. Verkruijsen, W. G. (1997). “De Medische Aansprakelijkheidsexplosie in Nederland: De Voorgeschiedenis en Het te Verwachten Vervolg.” *NJB*. 846–853.
161. There were no data available for The Netherlands.
162. See Van Mierlo, J. G. A. (1995). “Economische Inschatting Van de Evolutie Van de Kosten Van Beroepsziekten en Arbeidsongevallen.” In M. G. Faure and T. Hartlief (eds.), *Verzekering en de Groeiende Aansprakelijkheidslast*. Deventer: Kluwer. 221–282; see also Faure, M. & Hartlief, T. (1996). “Ontwikkelingen in de Werkgeversaansprakelijkheid Voor Beroepsziekten: Aanleiding Voor Een Nieuwe AVB-Polis?” *Aansprakelijkheid en Verzekering*. 140–151.
163. From so-called “loss-occurrence” to “claims made” coverage.
164. See Verbond van Verzekeraars. (1994). *Verzekerd Van Cijfers*. 38.
165. Haazen, A. O. & Spier, J., *l.c.* 10–11.
166. This is a claim made by an expert on asbestos P. Swuste of Delft University.
167. So Faure, M. & Hartlief, T. (1996). “Een Asbestfonds Als Alternatief Voor de Aansprakelijkheid Van de Werkgever.” *Sociaal Recht*. 37–43.
168. Spier, J. (1999). “Er Zijn Cijfers Nodig.” *Welwezen*. March 20–21. He had argued many times before that insurers are apparently not able (or not willing) to provide adequate statistical material on the evolution on accident rates; see e.g. Haazen, O. A. & Spier, J., *l.c.* 9–10.
169. See for instance Shavell, S. (1979). “On Moral Hazard and Insurance.” *Quarterly Journal of Economics*. 541–562.
170. See Lemaire, J. (1995). *Bonus-Malus Systems in Automobile Insurance*, Boston: Kluwer Law International; Lemaire, J. (1988). *Journal of Risk and Insurance*. 660; and see for a summary of these findings the dissertation of Van Dam, M.
171. These data are discussed by Van den Bergh, R., *l.c.* (1998). 57–58.
172. Bijleveld, F. D. (1998). “Het Effect Van de Bonus-Malus-Regeling Op Schademeldingen.” *Stichting Wetenschappelijk Onderzoek Verkeersveiligheid (SWOV)*, R98-47, Leidschendam.

173. Priest, G. (1987). "The Current Insurance Crisis and Modern Tort Law." *Yale Law Journal*. 1521–1590.
174. See Hoekema, A. J. (1980). "Rechtssociologische Aantekeningen Bij Het Schadevergoedingsrecht." *Nederlands Juristenblad*. 977–1000.
175. See the discussion of these proposals by Faure, M. & Hartlief, T. (1998). "Verzekering en Financiering Van Beroepsziekten: Enkele Tips Voor de SER." *Nederlands Juristenblad*. 1135–1142.
176. See for instance Hartlief, T. (1998). "De Positie Van Bestuurder en Inzittende in Het Nederlandse Wetsvoorstel." In M. Faure and T. Hartlief (eds.), *Verkeersaansprakelijkheid in België en Nederland*, Antwerp: Intersentia, 147–196.
177. See Van den Bergh, R., *l.c.* (1998). 68, see especially footnote 87.
178. Bruinsma, F. (1993). "Rechtssociologie in Nederland. Kroniek Over de Jaren '82–'92." *Nederlands Juristenblad*. 595.

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